

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

§ Civil Action No. H-01-3624  
§ (Consolidated)  
§

§ CLASS ACTION  
§

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This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

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THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

United States Courts  
Southern District of Texas  
FILED  
JUL 02 2004  
Michael N. Milby, Clerk

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**LEAD PLAINTIFF'S OPPOSITION TO DEUTSCHE BANK ENTITIES' SUR-REPLY  
IN "FURTHER OPPOSITION" TO LEAD PLAINTIFF'S MOTION FOR  
RECONSIDERATION OF MARCH 29 ORDER DISMISSING CLAIMS AGAINST  
DEUTSCHE BANK ENTITIES  
(DOCKET NO. 2228)**

2256

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## I. INTRODUCTION

Without seeking leave of the Court to do so, Deutsche Bank has filed a “sur-reply” that neither cites new authority nor shows it was necessary to address any “new” argument in plaintiffs’ reply papers. In its “Sur-Reply,” Deutsche Bank makes several new arguments, not properly before the Court.

## II. ARGUMENT

### A. Deutsche Bank’s New Scienter Arguments Are Unfounded

The crux of the Sur-Reply is plaintiffs failed to adequately plead scienter because plaintiffs did not identify by name the various Deutsche Bank employees who worked to falsify Enron’s financial results and/or knew Enron’s financial results were falsified. Deutsche Bank’s criticism misses the mark in several respects. Moreover, plaintiffs do name some of the individual Deutsche Bank bankers that acted with scienter in falsifying Enron’s financial results.

There is simply no reason to require plaintiffs to identify *by name* the individual Deutsche Bank employees who falsified Enron’s financial results and knew Deutsche Bank’s statements about those results to be false and misleading. Deutsche Bank’s arguments to the contrary are ill-founded in the law. For example, Deutsche Bank incorrectly argues:

Although plaintiffs need not name the agent who made the alleged material misstatement or omission as an individual defendant to satisfy *Southland*, they nonetheless ***must identify the agent*** who allegedly made each misstatement or omission ***and allege particular facts giving rise to a strong inference of scienter*** before a company can be held primarily liable for such statements under a theory of *respondeat superior*.

Sur-Reply at 5 (emphasis in original)<sup>1</sup> (citing *Southland Sec. Corp. v. Inspire Ins. Solutions Inc.*, 365 F.3d 353, 366-67 (5th Cir. 2004)). Deutsche Bank misreads *Southland* in several respects. ***First***, *Southland* clearly states that there is no need that the individual who makes a statement must be the

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<sup>1</sup> Emphasis is added and citations and footnotes are omitted unless otherwise noted.

same person who acted with scienter, only that there be some employee with scienter with some connection to the false and misleading statement. *Southland*, 365 F.3d at 366-67. **Second**, nowhere in *Southland* does the Fifth Circuit require a plaintiff to identify **by name** the individual employee of a company who acted with scienter. Whereas Deutsche Bank argues to the contrary, a careful reading of the cited passage reveals Deutsche Bank's conclusion is unfounded. And, **third**, contrary to Deutsche Bank's implicit assumption, nowhere in *Southland* did the Fifth Circuit require plaintiffs to prove corporate liability exclusively via *respondeat superior*. Indeed, corporate liability is not limited to derivative liability as "the Supreme Court has noted that corporations face **direct** liability under section 10(b) of the 1934 Act and Rule 10b-5." *Caterpillar v. Great Am. Ins. Co.*, 62 F.3d 955, 962 (7th Cir. 1995) (citing cases).

Moreover, whether *Southland* is even applicable here is doubtful. *Southland* involved neither an investment bank defendant, nor the issuance of false analyst statements and the sale of securities via false offering documents. Further still, defendants in *Southland* were not charged with committing acts in furtherance of a fraudulent scheme in violation of Rule 10b-5(a) and (c). Here, Deutsche Bank falsified Enron's financials via the STDs and then, during the Class Period, committed additional acts in furtherance of the Enron Ponzi scheme by selling Enron securities, thereby infusing cash into the capital-hungry scam whereby defendants falsified Enron's earnings reports and matched those results with cash flows from hidden loans.

Apart from Deutsche Bank's failures noted above, perhaps the most glaring failure in Deutsche Bank's argument is that plaintiffs do actually identify the Deutsche Bank employees who knew or recklessly disregarded that Enron's financial results (and thus Deutsche Bank's statements regarding those results) were false and misleading. For example, plaintiffs have repeatedly asserted that the individual bankers who worked on the fraudulent STDs knew Enron's financials to be false. *See, e.g.*, Plaintiffs' Memorandum of Law in Opposition to the Deutsche Bank Defendants' Motion

to Dismiss at 19-21, 24-25 (Docket No. 1707); Lead Plaintiff's Motion for Reconsideration of Order Dismissing Claims Against the Deutsche Bank Defendants at 2, 5 (Docket No. 2101); Lead Plaintiff's Reply Brief in Further Support of its Motion for Reconsideration of Order Dismissing Claims Against the Deutsche Bank Defendants at 6-8 (Docket No. 2199). Even though plaintiffs are not obligated to identify the individual Deutsche Bank bankers by name, *plaintiffs pleaded the conduct, scienter, and the names of Deutsche Bank employees Thomas Finely, Brian McGuire and William Boyle*. ¶¶797.5, 797.8. Moreover, plaintiffs' Complaint specifically references and relies upon several documents (including a report by the Senate Finance Committee and the Court-Appointed Bankruptcy Examiner's report) that specifically name additional Deutsche Bank employees that worked to falsify Enron's financial results and/or knew those results to be falsified. Assuming, *arguendo*, an obligation to name individual Deutsche Bank employees, the Court may take judicial notice of the names incorporated therein or require plaintiffs to amend their pleadings to include these names in the Complaint.

**B. Plaintiffs Adequately Plead Subject Matter Jurisdiction Over the Sale of the Debt Securities by Deutsche Bank**

**1. The Substance of Deutsche Bank's Subject Matter Jurisdiction Argument Has Changed Drastically and Misstates the Facts**

While it is true that plaintiffs here allege Deutsche Bank sold the Foreign Debt Securities to foreign purchasers pursuant to Regulation S, *Deutsche Bank also sold the same securities to U.S. entities classified as qualified institutional investors pursuant to Rule 144A – including plaintiff Imperial County Employees Retirement System*. See, e.g., *In re Enron Corp. Sec.*, 310 F. Supp. 2d 819, 841 n.29 (S.D. Tex. 2004) (“The Court recently granted a motion to intervene brought by Imperial County Employees Retirement System (“ICERS”), which did purchase on July 12, 2001 \$345,000 par value of Marlin Water Trust II Notes, for which Deutsche Bank served as one of the underwriters and which would have standing to sue.”). Deutsche Bank originally argued that the

Court did not have jurisdiction over the securities sold to foreign entities pursuant to Regulation S, **but Deutsche Bank did not previously assert the same argument with respect to securities bought by U.S. entities via Regulation 144A.** See, e.g., Opposition at 7 (Docket No. 2145) (“This Court does not have subject matter jurisdiction over any sales made by any DB Entity under Regulation S.”). Now, for the first time, Deutsche Bank asks the Court to “dismiss with prejudice **all** remaining 1933 Act claims against DBSI and DB” and **erroneously** asserts “the Foreign Debt Securities were issued under Regulation S, which exempts offers and sales occurring outside the United States from compliance with Section 5 of the Securities Act of 1933.” Sur-Reply at 7-8, 10. Deutsche Bank further contends that “[t]he ‘predominantly foreign’ nature of the Foreign Debt Securities alone suffices to subject plaintiffs’ claims to jurisdictional scrutiny.” *Id.* at 8. The Sur-Reply nowhere mentions the Regulation 144A sales, and is misleading in its characterization of the offerings as performed pursuant to Regulation S.<sup>2</sup> Deutsche Bank’s subject matter jurisdiction argument, as further detailed below, is incorrect and misleading.

**2. Deutsche Bank Proffers Authority it Never Previously Cited and Which Is Clearly Distinguishable**

Deutsche Bank cites for the first time in its sur-reply *Nikko Asset Mgmt. Co. v. UBS AG, UBS Warburg (Japan), Ltd.*, 303 F. Supp. 2d 456 (S.D.N.Y. 2004).<sup>3</sup> *Nikko*, however, involved only a foreign purchaser plaintiff, who bought pursuant to Regulation S, and a foreign seller defendant. As

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<sup>2</sup> This is particularly so considering Deutsche Bank has admitted the securities at issue were sold to U.S. entities via Rule 144A. See, e.g., Memorandum of Law in Support of Defendants the Deutsche Bank Entities’ Motion to Dismiss at 26-27 (Docket No. 1621) (“The face of the [offering memoranda] from each of the Four note resales states that they were made pursuant to Rule 144A and Regulation S.”).

<sup>3</sup> *Nikko* was decided in February, prior to the date on which Deutsche Bank filed its Opposition Brief to plaintiffs’ Motion for Reconsideration. Accordingly, *Nikko* is **not** properly before the Court as a supplemental authority.

demonstrated above, ICERS is a U.S. entity that purchased pursuant to Regulation 144A. Accordingly, *Nikko* is not on point.

*Nikko* is further distinguishable. The *Nikko* plaintiff pleaded neither harm to U.S. investors nor charged U.S. defendants with perpetrating a fraudulent Ponzi scheme supported by the sale of the foreign debt securities. Here, U.S. and foreign plaintiffs were damaged by a Ponzi scheme conducted by U.S. and foreign defendants. The defendants' sales of the foreign debt securities was an essential part of the Enron Ponzi scheme, supplying Enron's banks with a means of defeasing their own Enron risk and enabling them to enter into more fraudulent, hidden loans. As such, the Court has subject matter jurisdiction of the whole matter.

**a. Plaintiffs Meet Both the Cause and Effects Test**

There are "two tests to determine whether the Court should entertain subject matter jurisdiction over a particular transnational securities fraud claim, the conduct test and the effects test." *Cromer Fin. Ltd. v. Berger*, No. 00 Civ. 2284 (DLC), 2003 U.S. Dist. LEXIS 10554, at \*7 (S.D.N.Y. June 23, 2003). "The two tests need not be applied 'separately and distinctly,' and 'a mixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.'" *Id.* In this action, plaintiffs satisfy both tests as defendants' conduct within the United States resulted in damages to plaintiffs in the United States. *Nikko*, which did not adequately allege either U.S. causes or effects, is distinguishable.

Unlike the *Nikko* case, plaintiffs here satisfy the "cause" test. In *Nikko*, the court was faced with an individual action concerning only the sale of a security between a foreign plaintiff and the foreign underwriter. Importantly, plaintiffs in *Nikko* did not allege that UBS Warburg LLC, "***the lone U.S. defendant***" in that action, played any role in the fraud perpetrated upon them. 303 F. Supp. 2d at 467. Here, plaintiffs allege that many defendants located in the United States perpetrated

the fraud against them. In an attempt to align their argument with the holding of *Nikko*, Deutsche Bank incorrectly asserts: “Nothing in the Amended Complaint ... suggests a causal connection between any conduct occurring in the United States and the alleged fraudulent nature of the Foreign Debt Securities.” Sur-Reply at 8. The Court has already rejected this characterization of plaintiffs’ pleadings. *See, e.g., In re Enron Corp.*, No. H-01-3624, 2004 U.S. Dist. LEXIS 8158, at \*138 (S.D. Tex. Feb. 24, 2004) (addressing motion to intervene representative of the foreign debt purchasers and asserting “*the factual bases of the claims of this new group of investors are very similar to and have much in common [with] those of the Newby Enron securities investors*”). *See also infra* §II.B.2.b.<sup>4</sup>

Unlike the *Nikko* case, plaintiffs here also satisfy the “effects” test. ““The effects test looks to the effect of the fraudulent conduct that ‘impacts’ on stock registered and listed on [an American] national securities exchange and [is] detrimental to the interests of American investors.”” *Cromer Fin., Ltd. v. Berger*, 137 F. Supp. 2d 452, 479 (S.D.N.Y. 2001). In *Nikko*, plaintiff did “not identify any domestic effects of the alleged fraud other than the assertion, unsupported by factual allegations, that ‘defendants’ illegal conduct had a substantial impact upon interstate conduct.” *Nikko*, 303 F. Supp. 2d at 464. Here, the securities at issue were sold to some foreign purchasers and to some domestic purchasers such as plaintiff ICERS. Moreover, the Court has already determined that the sales of the foreign debt securities was an essential element of the Enron Ponzi scheme that damaged investors in Enron’s publicly traded securities here in the United States. *Enron*, 2004 U.S. Dist.

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<sup>4</sup> Moreover, plaintiffs in *Nikko* did not allege that any “structuring, marketing, or transactional activity” occurred in the United States. *Nikko*, 303 F. Supp. 2d at 466. Here, plaintiffs contend that the defendants structured the complex offerings in the United States to fool U.S. rating agencies, worked with Enron and its counsel to draft the offering documents, and performed due diligence in the United States on Enron.

LEXIS 8158, at \*137. *See also infra* §II.B.2.b. Accordingly, unlike *Nikko*, plaintiffs satisfy the “effects” test here.

**b. The Court Has Supplemental Jurisdiction Over the Claims of Foreign Purchasers**

Even assuming, *arguendo*, foreign purchasers of the foreign debt securities do not independently plead subject matter jurisdiction, the Court has jurisdiction nonetheless.

As part of the Judicial Improvements Act of 1990, 104 Stat. 5089 et seq., district courts are now granted “supplemental jurisdiction” over claims so related to a federal question “that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. §1367(a). This is a broad grant ....

*Rodriguez v. Pacificare of Tex. Inc.*, 980 F.2d 1014, 1018 (5th Cir. 1993). Here, there can be little doubt that the foreign purchaser plaintiffs’ claims arise from the same case and controversy that is properly before the Court presently. The Court has described the sale of the foreign debt securities as an “*added facet of the alleged Ponzi scheme*” that was “*part and parcel of the Newby scheme involving the identical conduct*” and that “*the factual bases of the claims of this new group of investors are very similar to and have much in common [with] those of the Newby Enron securities investors.*” *Enron*, 2004 U.S. Dist. LEXIS 8158, at \*137 n.63, \*138. Further opining on the similarity between the claims of the foreign debt purchasers and those original pleaded in this action, the Court stated:

[T]he Court agrees with Movant that key legal issues in the two suits are virtually identical or significantly related and that there is clearly overlap on factual matters, although the particular securities purchased by investor/plaintiffs differ. Indeed, as noted, although investors in the Enron-related entities that issued the Foreign Debt Securities were not expressly included in the class in the original *Newby* complaint, those entities themselves were identified and described in the previous complaints as SPEs and partnerships illicitly created and exploited in transactions as part of the Ponzi scheme ....

*Id.* at \*140. Supplemental jurisdiction allows the Court to adjudicate the entire Enron Ponzi scheme and all of its facets.

*Cromer* is again instructive concerning the Court's ability to exert jurisdiction here over the foreign purchasers' claims. The *Cromer* court found that where it had subject matter jurisdiction as to the alleged fraudulent scheme, it could address all aspects of that scheme:

There is no dispute that ***DTB is properly joined as a party to this action*** under traditional joinder principles. ***All of the causes of action and defendants are tied together through their connection to the single scheme which was the fraud committed by Berger in New York. It matters not, therefore, whether any beneficial owner of shares in the Fund or the two named plaintiffs are United States residents.***

DTB's remaining argument is that the issue of subject matter jurisdiction is defendant specific and that its conduct cannot be aggregated with the conduct of any other defendant in assessing jurisdiction.....

DTB, however, is wrong about the standard for subject matter jurisdiction. The issue is whether the court has jurisdiction over the transaction, not whether it separately has jurisdiction over the particular acts committed by each defendant in connection with the transaction.

2003 U.S. Dist. LEXIS 10554, at \*11-\*13.

Accordingly, even assuming, *arguendo*, that the foreign purchaser plaintiffs do not independently plead adequate U.S. contacts to establish subject matter jurisdiction, which they do, the Court has supplemental subject matter jurisdiction over all plaintiffs' claims against all the defendants, including the claims concerning the foreign debt securities.

**C. Plaintiffs Do Not Concede Their Claims as to the Osprey I Offering**

Deutsche Bank's assertion to the contrary, plaintiffs have not "tacitly conceded" that "plaintiffs' claims as to the Osprey I note resales in September 1999 are time-barred by the statute of repose." Sur-Reply at 9. Rather, plaintiffs expressly contended that they still maintain actionable claims as to this offering under a fraud theory. See Reply at 15 n.9.

### III. CONCLUSION

For the reasons stated herein, and in plaintiffs' previous briefing on the matter, plaintiffs respectfully submit that the Court should grant plaintiffs' motion for reconsideration in full and deny Deutsche Bank's motion for dismissal pursuant to subject matter jurisdiction.

DATED: July 2, 2004

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# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEUTSCHE BANK ENTITIES' SUR-REPLY IN "FURTHER OPPOSITION" TO LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF MARCH 29 ORDER DISMISSING CLAIMS AGAINST DEUTSCHE BANK ENTITIES (DOCKET NO. 2228) document has been served by sending a copy via electronic mail to [serve@ESL3624.com](mailto:serve@ESL3624.com) on this July 2, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEUTSCHE BANK ENTITIES' SUR-REPLY IN "FURTHER OPPOSITION" TO LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF MARCH 29 ORDER DISMISSING CLAIMS AGAINST DEUTSCHE BANK ENTITIES (DOCKET NO. 2228) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this July 2, 2004.

Carolyn S. Schwartz  
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Mo Maloney